In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 529

FRED T. MACKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 411 F. 2d 504. The memorandum opinion of the district court (Pet. App. 10a–22a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1969. (Pet. App. 23a.) The petition for a writ of certiorari was filed on August 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's 1964 conviction for income tax evasion should be set aside on collateral attack on the

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basis of petitioner's contention that the admission in evidence of his wagering tax returns to show a likely source of income violated his privilege against self-incrimination.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Indiana of willfully attempting to evade income taxes by filing false and fraudulent joint individual income tax returns for the years 1956 through 1960. The conviction was affirmed on direct appeal, 345 F. 2d 499, certiorari denied, 382 U.S. 824. Following this Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, petitioner filed a motion under 28 U.S.C. 2255 to set aside his conviction[1] on the ground that the admission in evidence of 60 monthly wagering tax returns at his trial violated his privilege against self-incrimination. No objection on self-incrimination grounds was made either at the trial, or on direct appeal from conviction (Pet. App. 11a). The district court held that petitioner was not entitled to relief under 28 U.S.C. 2255 (Pet. App. B), and the court of appeals affirmed (Pet. App. A).

The government's evidence at trial showed that the net worth of petitioner and his wife increased from $361,461.52 to $1,519,744.05 during the five-year period involved, although their joint returns filed during the same period reported a total taxable income of only $143,339.24. The government's theory was that these

[1] Petitioner is presently on parole.

net worth increases, which included assets held in the names of nominees and companies controlled by petitioner, could not be accounted for by the combined receipts of the controlled companies and the income reported by petitioner, and that these assets were acquired by petitioner from unreported funds derived from his policy wheel (gambling) business. See *United States* v. *Mackey*, 345 F. 2d 499, 501. In order to show this likely source, the wagering excise tax returns were admitted in evidence. (R. 14–15, 19.)[2] Petitioner objected on the ground that the only purpose in introducing the returns was to create bias and prejudice in the minds of the jury because the same information was already in evidence—*i.e.*, since petitioner's income tax returns reported the amount of the (10%) federal excise tax paid on the gross receipts from petitioner's policy wheel business (as well as the net income), the gross receipts from the business could be calculated by multiplying the reported taxes by ten (R. 7–9, 13–14).[3] Petitioner's counsel conceded that the tax returns reported only a net figure (wagering receipts minus pay-outs), rather than the actual gross receipts from wagers. (R. 7–8.) The trial court concluded that, since the gross receipts did not appear in the income tax returns, the wagering tax returns themselves should be admitted. The court observed (R. 15): "I do not think the Government is required to ask the jury or anyone else to make a computation

[2] "R." refers to petitioner's appendix filed in the court of appeals.

[3] Petitioner's individual income tax returns contained a separate Schedule C which described petitioner's business as "policy operator".

from Schedule C, if that is the only evidence available."

ARGUMENT

1. Petitioner was represented by counsel at his trial for income tax evasion and was entirely free to object to the admission in evidence of his wagering tax returns on self-incrimination grounds. By failing to make any such objection, he must be deemed to have waived the point. He cannot excuse his failure by asserting that he relied on *United States* v. *Kahriger*, 345 U.S. 22, or *Lewis* v. *United States*, 348 U.S. 419. Those cases held only that one who failed to register and pay the $50 occupational tax may be convicted for such failure; they did not decide the question whether forms or returns filed under the wagering tax laws could be used in evidence. It does not follow that even though petitioner may have felt obliged to file the returns under then-existing law, he also had reason to believe that it would be fruitless to object to the use to which they were put at his trial. The point was not decided in *Kahriger* and *Lewis*, and it remained open to petitioner if he thought it had merit.

2. Petitioner's belated self-incrimination contention rests exclusively on the principles announced by this Court in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62. His reliance on those cases is misplaced, however.

Even if petitioner had raised a self-incrimination objection to the admission of the wagering tax returns, it is doubtful whether such an objection would be sustained under the rationale of *Marchetti* and *Grosso*. The privilege was sustained as a defense in

those cases because a person required to file such returns is confronted by the substantial hazard that they may be used to convict him for having violated the laws against gambling. Here, petitioner was not prosecuted for any violation of gambling laws, but for filing false income tax returns on which he failed to report all of his taxable income; the returns were used to show a likely taxable source for proven increases in petitioner's net worth. Any kind of tax return, although it was filed under the compulsion of a statute, is ordinarily admissible when it is similarly relevant in a criminal case.[4] To the extent that petitioner was incriminated, it arose solely from the fact that he had reported the receipt of income, and was entirely unrelated to the source of that income. Thus, there is no ground for petitioner's assertion (Pet. 9) that "This is a coerced confession case." The returns showing gross receipts from gambling hardly constituted an admission of any income tax offense until petitioner himself later undertook to omit a substantial part of his income from his tax returns. The wagering returns would have been just as relevant if gambling had been a lawful activity.

Moreover, to the extent that *Marchetti* and *Grosso* are necessary to sustain petitioner's contention, those

[4] Thus, in prosecutions for income tax evasion, a taxpayer's income tax returns for prior years are frequently introduced in evidence in order to contradict the defense that net worth increases are attributable to large prior accumulations of cash, or to show a long-standing pattern of understating income, in proof of willfulness. See, *e.g.*, *Holland* v. *United States*, 348 U.S. 121; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Alker*, 260 F. 2d 135, 148 (C.A. 3), certiorari denied, 359 U.S. 906.

decisions should not be applied retroactively to this case, for the reasons fully stated by the court of appeals (Pet. App. 4a–9a). "The unreliability of the fact-finding process which is the touchstone of retroactivity is simply not threatened by the impersonal command of the wagering tax laws" (Pet. App. 7a). In such circumstances, this Court has denied retroactive application of an overruling constitutional decision. See *Tehan* v. *Shott*, 382 U.S. 406, 415–416; *Linkletter* v. *Walker*, 381 U.S. 618, 639.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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